Supreme Court, U.S.
FILED

94 927 OCT 25 1994

OFFICE OF THE CLERK

No. 94-

In The

Supreme Court of the United States

October Term, 1994

DONALD J. WOODS AND LOLA JEAN WOODS,

Petitioners,

v.

FEDERAL LAND BANK OF OMAHA,

Respondents.

Petition For Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOHN W. HOFMEYER, III
Counsel of Record
Attorney at Law
8 East Charles
Oelwein, Iowa 50662
Ph. (319) 283-4785

Counsel for the Petitioners, Donald J. Woods and Lola Jean Woods

LARRY F. WOODS
Attorney at Law
24 North Frederick
Oelwein, Iowa 50662
Ph. (319) 283-3204

Counsel for the Petitioners, Donald J. Woods and Lola Jean Woods

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the modification of an Iowa Statute which had fixed attorney's fees based on a percentage of the judgment at the time the promissory note is executed can be modified and applied retroactively to allow for discretionary attorney's fees. The application of the statute retroactively creates a taking of property without due process in violation of the Fourth and Fourteenth Amendments to the United States Constitutions, and violates the Contract Clause of Article I, Section 10, Clause 1 of the United States Constitution.

STATEMENT WITH REGARD TO PARTIES

The Petitioners are individuals. The Federal Land Bank is a Corporation which is organized under the laws of the United States Government, specifically 20 U.S.C. Associated companies, and corporations included Production Credit Association, Farm Credit Bank and all subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT WITH REGARD TO PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

A. The Underlying Facts Which Give Rise to the Constitutional Issue and Statutory Interpretation Issue Before this Court 4

B. The Iowa Supreme Court Decision as Which Of the Provisions of Section 625.22 is Controlling is in Direct Conflict With the Interpretation of the Same Statute by the Eighth Circuit 7

REASONS FOR GRANTING THE PETITION FOR WRIT 9

I. THE DECISION OF THE IOWA SUPREME COURT IS ERRONEOUS 10

II. THE QUESTION PRESENTED IS IMPORTANT 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 11

Energy Preserves Group v. Kansas Power and Light Co., 459 U.S. 400 (1983) 11, 14

Exxon Corporation v. Eageton, 462 U.S. 191 (1984) 15

Holiday Inns Franchising, Inc. v. Branstad, 29 F.3rd 383 (8th Cir. 1994) 11, 13, 14

McDonald Corporation v. Nelson, 822 F. Supp. 597 (Iowa N.D. 1994) 11, 12, 13

Merrill Lynch v. Knudsen, 749 F.2d 496 (8th Cir. 1984) 6, 8, 10, 11, 14, 16

STATUTES AND REGULATIONS:

Section 625.22 of the Iowa Code (1975) .. 3, 7, 12, 13, 15

Section 625.22 of the Iowa Code (1980) 6, 8, 9, 10, 12, 15

Article I, Section 10, Clause 1 4

The Fourth Amendment of the United States Constitution 4, 16

The Fourteenth Amendment of the United States Constitution 4, 16

12 U.S.C. 2018(2) 5

Article III of the United States Constitution 2

No. 94-___

In The

Supreme Court of the United States

October Term, 1994

DONALD J. WOODS AND LOLA JEAN WOODS,

Petitioners,

v.

FEDERAL LAND BANK OF OMAHA,

Respondents.

Petition For Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

Donald J. Woods and Lola Jean Woods respectfully petition for a Writ of Certiorari to review the Judgment of the Iowa Supreme Court in this case.

OPINIONS BELOW

The previous opinions of the Iowa Supreme Court appear at 480 N.W.2d 61 (Iowa 1992) and an unreported opinion as of the date of this Petition for Certiorari which is included in the appendix, and filed with the Iowa Supreme Court on the 27th of July, 1994.

JURISDICTION

The Iowa Supreme Court has entered two rulings in the case of *Federal Land Bank v. Donald and Lola Jean Woods*. The Final Opinion was filed by the Iowa Supreme Court on the 27th of July, 1994. The United States Supreme Court has jurisdiction under Article III of the United States Constitution. The statutory provision which enforces Article III jurisdiction in this case is 28 U.S.C. Section 1257 (a).

The constitutional issues were first raised in a Motion to Adjudicate Law Points filed by Donald J. Woods and Lola Jean Woods before the Iowa District Court. The form in which the constitutional issues were raised was that the Constitution would prohibit a retroactive application of the modified statute. It was indicated that the Eighth Circuit did not reach the constitutional issue, because of its interpretation. However, the Petitioners, Donald J. Woods and Lola Jean Woods believed that the constitutional issue was a factor in the way the Eighth Circuit initially construed the statute. Donald J. Woods and Lola Jean Woods prevailed on the Motion to Adjudicate Law Points. The applicable statute was held to be the version in effect on the date the promissory note was executed.

FLB appealed to the Iowa Supreme Court. However, it did not raise the issue of which version was to be applied, and thus, apparently did not attempt to modify the District Court's ruling that Donald J. Woods and Lola Jean Woods' position was correct. Donald J. Woods and Lola Jean Woods' Reply Brief specifically notes this, and also notes the Eighth Circuit's Opinion, and the fact that *Knudsen* was decided without reaching the Constitutional

Questions present. The Federal Land Bank Reply Brief, for the first time raised the issue as to which version of the statute was to be applied. This violates the Iowa Rules of Appellate Procedure. However, when the Iowa Supreme Court reversed the Jury verdict, and the Supreme Court Ordered that the 1980 version of the statute was to be applied.

On remand, Donald J. Woods and Lola Jean Woods again raised the issue of whether the modified statute could be constitutionally applied in these facts and circumstances. The Iowa District Court held that it could not overrule the directions of the Iowa Supreme Court, and applied the 1980 version. The Petitioners, Donald J. Woods and Lola Jean Woods appealed this ruling to the Iowa Supreme Court, again based on Federal and State Constitutional grounds. The Iowa Supreme Court again chose not to address the issue, but merely ruled that the Court would stand by its previous ruling, and that all of the issues had been adequately addressed therein.

STATUTORY PROVISIONS INVOLVED

The Applicable Statutory provisions involved begin with Section 625.22 of the Iowa Code (1975) and the same section as amended in 1980. The 1975 version which was in effect on the date of execution of the promissory note provided as follows:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as part of the costs:

1. On the first two hundred dollars or fraction thereof recovered, ten percent.

2. On the excess of two hundred to five hundred dollars, five percent.

3. On the excess of five hundred to one thousand dollars, three percent.

4. On all sums in excess of one thousand dollars, one percent.

The statute was changed in 1980. The relevant portion of the statute provided as follows:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as part of the costs a reasonable attorney's fees to be determined by the Court.

Also applicable is Article I, Section 10, the first clause and the Fourth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A. The Underlying Facts Which Give Rise to the Constitutional Issue and Statutory Interpretation Issue Before this Court.

The Petitioners, Donald J. Woods and Lola Jean Woods, were named Defendants to an action by the Respondent, Federal Land Bank, on a Promissory Note. The Promissory Note arose from a transaction wherein the Petitioners, Donald J. Woods and Lola Jean Woods were purchasing a farm. The Petitioners obtained their

financing from Federal Land Bank. Donald J. Woods and Lola Jean Woods signed a Promissory Note and Mortgage. The promissory note provided that attorney's fees could be recovered from the borrowers. The Mortgage was to be a first and valid lien on the premises in accord with 12 U.S.C. 2018(2).

At the time of the purchase, there was a pending specific performance action which sought to have the sellers of the property, Schmitts convey the property to Mosers. This created a cloud on the title.

Through subsequent litigation, it was determined that Mosers were entitled to the real estate, and that the Donald J. Woods and Lola Jean Woods and Federal Land Bank interest, including Federal Land Bank's Mortgage to the property were junior and inferior to any interest of the Mosers.

FLB brought suit against Donald J. Woods and Lola Jean Woods when the Woods refused to pay the Note. Woods refusal was based on their contention that there was a partial failure of consideration, and on counterclaims based in part that a standard of care which can be used is set forth in Section 12 U.S.C. 2018(2). This Section requires Federal Land Bank to have a first and valid Mortgage on the property.

Prior to the commencement of the Trial, the Petitioners, Donald J. Woods and Lola Jean Woods filed a Motion to Adjudicate Law Points. The issue presented was whether the amount of attorney's fees were controlled by the statute in effect on the date of the execution of the promissory note was applicable, or the statute in effect on the date the action was brought. The District

Court followed the Eighth Circuit case of *Merrill Lynch v. Knudsen*, 749 F.2d 496. (8th Cir. 1984). The *Knudsen* case held that the attorney's fees to be awarded were governed by the statute in effect at the time of the contract, rather than a subsequently amended statute.

The trial resulted in the jury finding a partial failure of consideration on the part of Federal Land Bank. The Trial Court refused to award any attorney's fees.

FLB did not mention this ruling in its Brief to the Iowa Supreme Court. However, in the case of *Federal Land Bank v. Woods*, 480 N.W. 2d 61, the Iowa Supreme Court ruled that the statute in effect on the date of the action being commenced was controlling. The Iowa Supreme Court also reversed the jury finding of partial failure of consideration. The Iowa Supreme Court then ordered Donald J. Woods and Lola Jean Woods to be responsible for attorney's fees to Federal Land Bank under Section 625.22 of the Iowa Code (1980).

Subsequent proceedings were held before the Iowa District Court. As part of those proceedings, Donald J. Woods and Lola Jean Woods again pointed out *Knudsen*, and also raised the constitutional arguments presented here. The Iowa District Court allowed in excess of $33,000 in attorney's fees, and overruled Donald J. Woods and Lola Jean Woods contention that application of the 1980 version of the statute was unconstitutional. Donald J. Woods and Lola Jean Woods appealed to the Iowa Supreme Court. In the appeal the constitutionality of applying the statute retroactively was raised. The Iowa Supreme Court chose not to address the issue. It merely indicated that the issue of attorney's fees had previously

been decided. The Iowa Supreme Court awarded in excess of $15,000 in additional attorney's fees.

B. The Iowa Supreme Court Decisions as Which Of the Provisions of Section 625.22 is Controlling is in Direct Conflict With the Interpretation of the Same Statute by the Eighth Circuit.

The holding in *Federal Land Bank v. Woods* 480 N.W.2d 61 (Iowa 1992), and again in the unreported opinion of *Federal Land Bank v. Woods* filed July 27, 1994, is clear that Woods must pay attorney's fees under the 1980 statute, which is the statute in effect at the time the action was brought. In 1984, the Eighth Circuit had before it the questions of which version of Section 625.22 of the Iowa Code was controlling where the action was brought after the modification in the statute, but when the contract was signed, the 1975 version was in effect. For reference the statutes provided as follows. Section 625.22 prior to 1975 provided:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as part of the costs:
>
> 1. On the first two hundred dollars or fraction thereof recovered, ten percent.
>
> 2. On the excess of two hundred to five hundred dollars, five percent.
>
> 3. On the excess of five hundred to one thousand dollars, three percent.
>
> 4. On all sums in excess of one thousand dollars, one percent.

In 1980, the Iowa legislature changed Section 625.22 to provide as follows:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as part of the costs a reasonable attorney's fee to be determined by the Court.

Prior to both of the *Federal Land Bank v. Woods,* cases the Eighth Circuit decided that the applicable section 625.22 was the version in effect on the date the instrument was signed. In doing so the Eighth Circuit held that attorney's fees on judgment for the balance of the promissory note would be governed by the statute in effect at the time of the contract rather than by the subsequently amended statute, which permitted the court to determine reasonable attorney's fees. The rationale of the Eighth Circuit was that to apply the 1980 version of the statute retroactively would have defeated the parties' expectations, ignored the law of the case, and abrogated the parties' contract. *Merrill Lynch v. Knudsen,* 749 F.2d 496 (8th Cir. 1984). While the Eighth Circuit did not specifically hold that the United States Constitution prohibited the statute from applying retroactively, the strong language of the Eighth Circuit shows constitutional considerations in deciding the *Knudsen* case. It is Donald J. Woods and Lola Jean Woods' position that the Court was applying the old maxim of law that when there are two ways to construe the statute, and one way may create constitutional infirmities, the statute is construed to avoid those infirmities. Thus, while the Eighth Circuit did not specifically hold as unconstitutional retroactively

applying the Statute to executed contracts, it did so only because the issue did not need to be reached.

REASONS FOR GRANTING THE PETITION FOR WRIT

Despite the strong language of the Eighth Circuit in holding the Statute could not be applied retroactively, the Iowa Supreme Court held the applicable statute upon which to base an award of attorney's fees was the statute in effect at the time the action was brought. (*Federal Land Bank v. Woods*). The Iowa Supreme Court rule gives the statute as passed in 1980 (Section 625.22) the effect of being applied retroactively. In direct contrast the Eighth Circuit held the statute could not be applied retroactively in *Knudsen*. Thus, the Iowa Supreme Court's Opinion is directly contrary to the Eighth Circuit's ruling in *Knudsen*. Since the *Knudsen* ruling is based on constitutional principles, that ruling must be controlling.

The Iowa Supreme Court elected not to address the issue of whether the statute could be retroactively applied, and be constitutional, when presented with the issued by these Petitioners Donald and Lola Jean Woods. Recently an Iowa case has been decided by the Eighth Circuit and the Federal District Court for the Northern District of Iowa on whether a statute can be retroactively applied to existing contracts. However, it does not appear there is much new case law in the United States Supreme Court on this issue. This Court should clearly enumerate to the lower courts when statutes can be constitutionally applied retroactively. Since the decision below is erroneous and important, the Court should take jurisdiction.

I. THE DECISION OF THE IOWA SUPREME COURT IS ERRONEOUS

The Eighth Circuit had before it a case with the identical issue which your Petitioners, Donald J. Woods and Lola Jean Woods presented to the Iowa Supreme Court. The decisions of the two courts are directly opposed to each other. The Iowa Supreme Court's decision is not based on any constitutional considerations, although your Petitioners brought the federal and state constitutional issues before the court.

It appears the Eighth Circuit decision of *Knudsen* was decided with constitutional principles in mind. The *Knudsen* Court held that the applicable section 625.22 was the version which was in effect on the date the instrument was signed. In doing so the Eighth Circuit held that attorney's fees on judgment for the balance of the promissory note would be governed by the statute in effect at the time of the contract rather than by the subsequently amended statute, which permitted the court to determine reasonable attorney's fees.

The rationale of the Eighth Circuit is what is important. The Eighth Circuit specifically held that to have applied the 1980 version of Section 625.22 retroactively would have defeated the parties' expectations, ignored the law of the case, and abrogated the parties' contract. *Merrill Lynch v. Knudsen*, 749 F.2d 496. (8th Cir. 1984). Even though the Eighth Circuit did not specifically hold that the United States Constitution prohibited the statute from applying retroactively, the strong language of the Eighth Circuit shows constitutional considerations in deciding the *Knudsen* case.

However, a recent Eighth Circuit Opinion with regard to whether an Iowa Statute could be applied retroactively is directly on point. This case affirms and refers to the Federal District Court case for the Northern District of Iowa. Since the *Knudsen* case specifically mentions interference with existing contracts, and retroactively, the *Knudsen* case appears to be a predecessor of these recent cases. These recent cases are on point. Those cases are *Holiday Inns Franchising, Inc., v. Branstad,* 29 F.3rd 383 (8th Cir. 1994), and *McDonald Corporation v. Nelson,* 822 F. Supp. 597 (Iowa N.D. 1994).

The Federal District Court for the Northern District of Iowa had the same issue of whether a set of statutes which were passed could be retroactively applied. The Federal District Court had before it a case where the Iowa Legislature had passed several provisions with an attempt to regulating franchising agreements which were already in effect. *McDonald Corporation v. Nelson,* 822 F. Supp. 597 (Iowa N.D. 1994).

The Federal District Court states that the threshold inquiry under the Contract clause is whether the statute has, in fact, operated as a substantial impairment of the contractual relationship. *McDonald Corporation v. Nelson,* 822 F. Supp 597, 605 (Iowa N.D. 1994); see also *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978); see also *Energy Preserves Group v. Kansas Power and Light Co.* 459 N.W.2d 400, 411 (1983).

The first question also asked by the Eighth Circuit in determining the constitutionality of the retroactive application of the Iowa statutes in *Holiday Inn,* was whether the retroactive feature of the relevant Iowa legislation

substantially impaired the obligations previously owed. Id at 384.

In this case there cannot be any question but which the change in the statute had a significant effect on the amount of attorney's fees which Federal Land Bank could collect from Donald J. Woods and Lola Jean Woods. Under Section 625.22 as it appears in 1975, Federal Land Bank could collect a total maximum of about $1,400 in attorney's fees. While under the provision of the statute as it appears in 1980 when the action was started, Federal Land Bank has now collected in excess of $48,000 in attorney's fees.

The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of the contract right is not necessary for the finding of substantial impairment. On the other hand, state regulation that restricts a party gains it reasonably expected from the contract does not necessarily constitute substantial impairment. *McDonald Corporation v. Nelson*, 822 F. Supp 597, 605-606 (Iowa N.D. 1994)

In examining these tests, there cannot be any question but what there is a new and substantial impairment created on Donald J. Woods and Lola Jean Woods by the application of the 1980 version of the statute. The actual impairment can be shown in this case in dollars and cents. Under the statute in effect on the date the promissory note was signed, Donald J. Woods and Lola Jean Woods would owe in attorney's fees $1,400.00. However, they have now been required to pay in excess of $48,000 in fees. The total amount of difference is in excess of $45,000 plus interest. Since the amount of change is 30

times greater under the statute when it is retroactively applied, clearly there is a substantial impairment as a result of the change in the statute applied retroactively. Thus, there is a material change in the rights of the parties which results from which statute is applied.

In *McDonald*, the Federal District Court of Iowa held that if there is found to be a substantial impairment which materially changes the rights of the parties, the court must then also consider whether there has been regulation of the area in the past, to determine the extent of the impairment. *McDonald Corporation v. Nelson*, 822 F. Supp 597, 606 (Iowa N.D. 1994). In this case, there has been regulation in Iowa on the attorney's fees awarded in cases which allowed attorney's fees to be collected from Defendants where attorney's fees are allowed. Section 625.22 (1975) as it appeared at the time Donald J. Woods and Lola Jean Woods signed the promissory note with Federal Land Bank had been in effect since at least 1939. There were statutes of a similar nature back to 1880. All of the statutes allowed for attorney's fees in cases where contracts allowed attorney's fees to be based on the total value of the judgment. This is relevant, since as a part of considering whether the impairment is significant, the Eighth Circuit, in its review of *McDonald* looked at a history of regulation and change in the area to indicate that when the parties were bargaining, whether or not they could reasonably expect a change in the statute. *Holiday Inns Franchising, Inc., v. Branstad*, 29 F.3rd 383 (8th Cir. 1994). Since Section 625.22 (1975) remained essentially the same for over 40 years at the time the parties signed the promissory note, it would not be reasonable for persons entering into a contract to expect a change in

the statute which would allow attorney's fees based on anything but a percentage of the judgment. Thus, as the *Knudsen* Court noted, there would not be any appreciable warning of any impending intervention into their agreement. *Holiday Inns,* at 385.

This concept follows with what the Eighth Circuit specifically noted in *Knudsen.* The *Knudsen* Court held that to have applied the statute Section 625.22 (1980) retroactively would have defeated the parties' contractual expectations, ignored the law, and abrogated the parties contract. Thus, there was not any reasonable expectation between the parties that there would be a change in the amount allowed as attorney's fees.

The final inquiry used in the *Holiday Inn* and *McDonald* cases go to whether there is some public purpose. In *McDonald,* the Federal District Court Judge noted that when retroactively applied statutes demonstrate modification of an existing contract to the extent substantial impairment is present, then there must be shown a significant and legitimate public purpose behind regulation to justify it. This purpose may be something such as remedying a broad and general social or economic problem. *McDonald Corporation v. Nelson,* 822 F. Supp 597, 608 (Iowa N.D. 1994), citing *Energy Reserves,* 459 U.S. 411-412.

In applying this test, the *McDonald* Court noted that cases which upheld retroactive legislation as applying to existing contracts when challenged under the Contract Clause "did not prescribe a rule limited in effect to contractual obligation or remedies, but instead imposed a generally applicable rule of conduct designed to advance a broad societal interest. *McDonald Corporation v. Nelson,*

822 F. Supp 597, 608 (Iowa N.D. 1994) citing *Exxon Corporation v. Eageton*, 462 U.S. 191. (1981)

In this case, it is clear that there is a substantial impairment. Also in this case, it is clear that there is no broad societal interest which is being advanced. It is also clear that what happens by applying the modified version of Section 625.22 is that the Federal Land Bank remedy is far greater than it was with the 1975 version in effect on the date of the execution of the promissory note. The net amount is in excess of $45,000.00.

Thus, applying Section 625.22 (1980) retroactively to the rights of the parties to a contract signed in 1975, and under a different version, substantially impairs the expectations of the parties, abrogates the contract, and ignores the law. *Knudsen* at page 498. Since there is not any broad general societal or economic purpose, applying the statute retroactively cannot pass constitutional muster. The United States Supreme Court should summarily reverse the Iowa Supreme Court, and hold that the applicable Section of 625.22 is the one in effect on the date of the execution of the promissory note in March 1975. The case should be remanded for entry of an appropriate Judgment and Decree.

II. THE QUESTION PRESENTED IS IMPORTANT

The United States Constitution is the law of the land. Donald J. Woods and Lola Jean Woods attempted to present the issue of whether the statute could be constitutionally applied before the Iowa Supreme Court. However, the Iowa Supreme Court elected not to address the issue. If the citizens of the United States are to be

controlled by constitutional principles, then when a statute is clearly in variance with those principles, the United States Supreme Court must address those issues. Further, it has been a significant period of time since the United States Supreme Court has addressed the methods and tests to be applied constitutionally of retroactive statutes. Thus, the area is one of broad base for guidance to the lower courts.

CONCLUSION

The Petition for Writ of Certiorari should be granted. As an alternative, the Court should grant summary certiorari, reversing the Iowa Supreme Court on this issue, and ordering the Iowa Supreme Court to enter an appropriate judgement in accord with the case of *Merrill Lynch v. Knudsen*, 749 F.2d 496. (8th Cir. 1984) The United States Supreme Court should hold *Merrill Lynch v. Knudsen*, 749 F.2d 496. (8th Cir. 1984) controlling on the issue of attorney's fees since applying the statute retroactively would violate Donald J. Woods and Lola Jean Woods constitutional rights under Article I Section 10, Clause 1, and the Fourth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

JOHN W. HOFMEYER III
Attorney at Law
8 East Charles
Oelwein, Iowa 50662
Ph. (319) 283-4785

Counsel for the Petitioners, Donald J. Woods and Lola Jean Woods

Respectfully submitted,

LARRY F. WOODS
Attorney at Law
24 North Frederick Ave.
Oelwein, Iowa 50662
Ph. (319) 283-3204

Counsel for the Petitioners, Donald J. Woods and Lola Jean Woods

Case No. 94-___

In The

Supreme Court of the United States

October Term, 1994

DONALD J. WOODS AND
LOLA JEAN WOODS,

Petitioners,

v.

FEDERAL LAND BANK OF OMAHA,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 168/93-113

Filed July 27, 1994

FEDERAL LAND BANK OF OMAHA,

Appellee,

vs.

DONALD J. WOODS and LOLA JEAN WOODS,

Appellants.

(Filed Jul. 27, 1994)

Appeal from the Iowa District Court for Fayette County, L.D. Lybbert, Judge.

Judgment debtors appeal from judgment entered on remand following prior appeal and from denial of motion to quash execution on that judgment. **AFFIRMED AND REMANDED.**

Larry F. Woods, Oelwein, for appellants.

Dale L. Putnam, Decorah, for appellee.

Considered by McGiverin, C.J., Carter, Lavorato, Snell, and Ternus, JJ.

CARTER, Justice.

Appellants, Donald J. Woods and Lola Jean Woods (the Woods), appeal from the judgment entered on remand following a prior appeal in this litigation. The judgment creditor is Federal Land Bank of Omaha (the bank). The Woods also appeal from the denial of a motion to quash execution on the judgment entered following

remand. After reviewing the record and considering the arguments presented, we affirm the judgment of the district court.

On January 22, 1992, we decided the sixth appeal in this protracted litigation. Our opinion in that matter, published as *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 61 (Iowa 1992) (*Moser VI*), recounts the prior history of the litigation. We will not repeat that recitation in this opinion. In *Moser VI*, we held that the amount owing to the bank by the Woods was more than the sum awarded to the bank in the district court's judgment of May 4, 1990. We therefore reversed that judgment and remanded the case to the district court for the entry of a new judgment in the amount this court had found to be owing plus an additional award of attorney fees for the bank to be established by the district court.

Procedendo on the *Moser VI* decision reached the district court on February 12, 1992. The district court held a hearing on the matter of the additional attorney fees, and subsequently, on November 5, 1992, entered judgment in favor of the bank and against the Woods for the amount of attorney fees it found due plus the other amounts that this court found to be owing to the bank in the *Moser VI* decision.[1] The Woods objected to the amount of the attorney fee allowed and further asserted that the court, in entering judgment, improperly compounded the amount of interest accruing subject to the filing of the bank's petition.

---

[1] This judgment was in part by nunc pro tunc entry filed November 9, 1992.

On November 12, 1992, execution was issued on the November 5 judgment. The Woods moved to quash that writ under Iowa Court section 615.3 (1991) on the ground that the judgment on which it was based was unenforceable because of lapse of time. In making that challenge, the Woods contended that the two-year limitation on enforcing judgments should, in the present case, be measured from the May 4, 1990 judgment that produced the *Moser VI* appeal. The motion to quash execution based on this theory was denied. This appeal followed.

I. The Enforcement of the judgment Under Section 615.3.

The Woods contend that section 615.3 rendered the bank's judgment unenforceable two years following the entry of the original judgment against them on May 4, 1990. The subsequent appeal, they urge, did not toll the running of the enforcement period that statute imposes. They seek support in the view from our decision in *Houghton State Bank v. Peterson*, 477 N.W.2d 94 (Iowa 1991).

We find the Woods' argument to be without merit. The appeal that was relied upon to toll the statute in the *Houghton* case was not from the judgment later sought to be enforced. We suggested in that case that the result might have been otherwise if it had been. The bank's position does not depend on that being true, however, because the present issue does not involve tolling. The *Moser VI* appeal was over and procedendo had issued nearly three months before section 615.3 would have barred execution on a judgment entered on May 4, 1990.

Because, however, that judgment had been reversed, the bank had no basis for causing execution to issue until a new judgment was issued following remand. That occurred on November 5, 1992, and triggered a fresh two-year enforcement period under section 615.3.

II. The Attorney Fee Issue.

The Woods argue that the amount awarded in the judgment for the bank's attorney fees in this litigation was excessive. No attorney fees were allowed by the district court at the time the original judgment was entered because the Woods had prevailed on a substantial part of their defense. We ordered, however, in *Moser VI*, 480 N.W.2d at 70, that on remand the district court should affix an allowance of attorney fees for the bank for the entire litigation, including the appeal.

Following an evidentiary hearing after remand, the district court found that the bank had expended for attorney fees in this litigation: $13,630 for legal services prior to the first trial (billed at $75 per hour); $22,430 for services from commencement of trial to conclusion of the appeal (32 hours of which was billed at $85 and the balance at $75 per hour). From these totals, the district court deleted certain claimed out-of-pocket expenses and adjusted attorney fees claimed for hours traveling to court. The amount of attorney fees and expenses that the court ultimately approved for inclusion in the judgment was $34,354.

Although the Woods urge that the sum allowed by the court was excessive, it appears to have been based on a reasonable hourly rate for efforts found reasonably to

be required by the pending litigation. The district court enjoys a rather broad discretion in establishing the amount of attorney fees that may be recovered pursuant to Iowa Code section 625.22. *3 S Inc., Co. v. Zarek,* 504 N.W.2d 153, 156-57 (Iowa App. 1993). There is no indication that the court abused its discretion in the present case.

The Woods also seek to relitigate on a new legal theory their claim in *Moser VI* that the attorney fee award must be capped by the statutory fee schedule in force at the time they executed the promissory note on which the bank's claim is based. Our holding, at 480 N.W.2d 70, is the law of the case on that issue and may not be challenged in subsequent proceedings based on a new legal theory. The district court properly followed our directive that the statutory cap on recovery of attorney fees at the time of the note's execution had been subsequently repealed and was nonapplicable.

In concluding discussion of the attorney fee issue, we are required to respond to the bank's contention that, as a result of the present appeal, it is entitled to recover additional fees. We find that contention to be correct. Rather than remanding the case to the district court for yet another evidentiary hearing, we order that an additional sum of $15,172 be added to the judgment to cover those services performed and expenses occurred by the bank's attorneys since the district court's last order on attorney fees.

III. The Compound Interest Issue.

As a final matter, we consider the Woods' claim that the judgment entry served to improperly compound the contractual interest they agreed to pay (at a rate of nine percent per annum) at a new decree rate of ten percent per annum. This occurred, they suggest, because the district court imposed decretal interest at a rate of ten percent per annum pursuant to Iowa Code section 535.3 from the date of the original judgment on May 4, 1990.

We find that two legal principles apply to control the disposition of this final issue. The first principle is that interest accruing on an obligation prior to entry of judgment is part of the damages to be awarded by the court in the judgment. *Failing v. Clemmer,* 49 Iowa 104 (1878). This requires the court, at some point, to aggregate the total of principal and interest owing into a single sum. Decretal interest under section 535.3 is then imposed on that aggregate. Prior to the 1980 amended to section 535.3, which provides that interest on the judgment relates back to the date of the filing of the petition, the time for aggregation of principal and accrued interest was the date of judgment. Since that amendment, this aggregation more properly should take place as of the date of filing and accrued interest should be computed only to that date.

The district court in the present case imposed the aggregation of interest and principal as of the date of the initial judgment. Although that was technically incorrect, it produced a result more favorable to the Woods than would have existed if the date of filing the petition had

been employed. Consequently, the Woods may not complain of the mistake.

The second principle that comes into play on the Woods' challenge is that ordinarily it is the role of an appellate court in ordering judgment on remand to establish that judgment as it should have been if correctly entered in the initial proceeding. *See Thomas v. Minner,* 340 N.W.2d 285, 288 (Iowa 1983). The district court properly applied this principle in the present case by formulating the new judgment in the context of a May 4, 1990 decree.

We have considered all issues presented and conclude that the judgment of the district court should be affirmed. The case is remanded to that court for the sole purpose of entering judgment for the additional sum that we have directed to be recovered by the bank as attorney fees for the latest proceedings in the litigation.

AFFIRMED AND REMANDED.

The FEDERAL LAND BANK OF OMAHA, A Corporation, Appellant,

v.

Donald J. WOODS and Lola Jean Woods, Appellees.

No. 90-747.

Supreme Court of Iowa.

Jan. 22, 1992.

Dale L. Putnam of Putnam and Strand Law Office, Decorah, for appellant.

Larry F. Woods, Oelwein, for appellees.

Considered by HARRIS, P.J. and CARTER, LAVORATO, NEUMAN, and SNELL, JJ.

LAVORATO, Justice.

This is the sixth appeal in a continuing saga arising from successive sales of a 285-acre farm with clouded title. It is a textbook example of the hair splitting inherent in protracted litigation: asserting all issues related to the same claim in separate lawsuits. *See Moser v. Thorp Sales Corp.* 256 N.W.2d 900 (Iowa 1977) (*Moser I*); *Moser v. Thorp Sales Corp.*, 312 N.W.2d 881 (Iowa 1981) (*Moser II*); *Moser v. Thorp Sales Corp.*, 334 N.W.2d 715 (Iowa 1983) (*Moser III*); *Neylan v. Moser*, 400 N.W.2d 538 (Iowa 1987) (*Moser IV*); *Woods v. Schmitt*, 439 N.W.2d 855 (Iowa 1989) (*Moser V*). At issue are several district court rulings in an action

on a promissory note secured by a purchase-money mortgage. The note and mortgage were executed and delivered to the plaintiff-bank by the defendants who used the borrowed funds to purchase the farm.

I. *Background Facts.*

To understand the present controversy, we think it would be instructive to set out some background facts preceding the transaction that generated this latest lawsuit.

In October 1971 Richard and Marguerite Schmitt were in possession of a Clayton county farm under a real estate contract. The district court had decreed a foreclosure of the contract, and the Schmitts' right of redemption against the contract vendors was about to end.

The Schmitts refinanced the farm with Thorp Finance Corporation of Wisconsin. As a condition for the refinancing, Thorp had the authority to auction the farm and all of the Schmitts' livestock, crops, and machinery. To secure the refinancing (a loan evidence by a note due January 15, 1972), the Schmitts executed and delivered to Thorp a real estate mortgage encumbering the farm.

On December 1 the auction was held and the farm was sold to Clifton G. Moser and Carlys C. Moser for $42,180. The Schmitts and Mosers then entered into an agreement entitled an "offer to buy" incorporating the sale terms and provisions for payment of taxes and commissions. The Mosers paid the down payment of $8430 called for by the agreement.

Closing was set for January 15, 1972. But the Schmitts refused to close and continued to farm the property.

Thorp then foreclosed its mortgage against the Schmitts in July 1973. In late August the Mosers sued the Schmitts for specific performance of the December 1, 1971, offer to buy. Later the Mosers joined Thorp as a defendant and amended their petition to include a count to quiet title. In October the district court enjoined the mortgaging, encumbering, or selling of the farm. But the court refused to enjoin the sheriff's foreclosure sale pursuant to the Thorp foreclosure decree.

In December 1973, the sheriff's sale was held and the sheriff's certificate of sale was issued to Thorp, the highest bidder.

In October 1974 the Schmitts conveyed their redemption rights to a trustee. On December 12, 1974 – just one day before the Schmitts' redemption rights were to expire – the trustee accepted an offer to buy the farm from Donald J. and Lola Jean Woods.

That brings us to the transaction in question. The Federal Land Bank of Omaha (FLB) loaned the Woods funds to cover a portion of the purchase price. The Woods had paid $9000 down with the offer on December 12, 1974, and paid an additional $41,000 on February 3, 1975.

FLB and the Woods had separate attorneys. Both attorneys examined the abstract and both noted in their title opinions the specific performance and quiet title actions brought by the Mosers. In addition, a real estate

agent who had shown the farm to the Woods on December 8, 1974, told them that the Mosers were claiming ownership of the farm.

In *Moser I*, this court determined that the Mosers had a valid and enforceable contract to buy the farm. *Moser I*, 256 N.W.2d at 907. This court remanded the case. The remand allowed the Mosers to amend their petition so they could add the Woods as defendants in their quiet title action. *Id.* at 912.

In *Moser II*, this court found that the Woods were not good faith purchasers of the property because they had notice of the Mosers' claim. *Moser II*, 312 N.W.2d at 886-90. The Woods' interest in the farm therefore rose no higher than the Schmitts' interest: the right to be paid the purchase price from the Mosers. *Id.* at 898. As a result of *Moser II*, title was quieted in the Mosers. The Woods were also ousted from possession and held liable for damages.

In the current brouhaha, FLB seeks reimbursement for funds it lent the Woods to purchase the farm. In this regard the Woods signed two documents in favor of FLB: (1) a promissory note for $76,500, and (2) a purchase-money mortgage. The woods signed the note and mortgage on February 26, 1975. In late March FLB conveyed the funds and the Woods delivered FLB the note and mortgage.

The Woods put $28,026 of the loan amount into a future payment account. They put the remainder toward the purchase price of the farm and loan costs.

When it became clear that the Woods did not have marketable title to the farm, the Woods discontinued

paying on the note. FLB then started this action to collect on the note.

II. *Background Proceedings.*

FLB filed its petition in July 1982. The Woods answered and asserted several affirmative defenses. The one pertinent here was failure of consideration. The Woods originally alleged a complete failure of consideration. They later amended to allege a partial failure of consideration.

The Woods also counterclaimed. They alleged negligence and breach of contract because of FLB's alleged failure to make sure that the mortgage was a first lien on the farm.

FLB's motions for summary judgment on these issues were overruled.

The Woods filed a jury demand. Later they withdrew it. This withdrawal allowed the district court to determine the validity of FLB's claim for the note balance. The counterclaims and all but one of the affirmative defenses were left for the jury.

The jury ruled in favor of FLB on the counterclaims. It also found in favor of FLB on all of the affirmative defenses except one: partial failure of consideration. The jury found in favor of the Woods on that affirmative defense. The district court found against the Woods on the one affirmative defense tried to the court: unjustifiable impairment of collateral.

After posttrial motions were filed and additional hearings, the court found for FLB on the note for

$128,469.57. However, the court offset this figure by the amount the jury found represented the partial failure of consideration. The court calculated the loss to the Woods as the difference between the farmland value they should have received ($90,000 purchase price) and the value of their interest ($32,969.13) as determined in *Moser III*. *See Moser III*, 343 N.W.2d at 719-20. This amounted to a set-off of $57,030.87. The district court set off this amount plus interest against the $128,469.57 judgment in favor of FLB, reducing the judgment to $68,571.54.

The district court denied the remaining posttrial motions of the parties, as well as their requests for attorney fees. FLB appealed; the Woods cross-appealed.

The appeal and cross-appeal raise a number of issues. But the result we reach on the appeal requires us to address only four.

III. *FLB's Motions for Directed Verdict and Judgment Notwithstanding the Verdict as to the Woods' Affirmative Defense of Partial Failure of Consideration.*

FLB moved for directed verdict on the partial failure of consideration defense. It urged there was not sufficient evidence to submit this defense. The district court denied the motion. Following trial, FLB moved for judgment notwithstanding the verdict on the same ground. The district court was denied this motion. FLB thinks these rulings were erroneous. We agree.

Iowa Rule of Civil Procedure 243 pertinently provides:

> Any party may, on motion, have judgment in his favor despite an adverse verdict . . . :
>
> . . . .
>
> b. If the movant was entitled to have a verdict directed for him at the close of all the evidence, and moved therefore, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant.

If the district court thinks it was wrong in denying a motion for directed verdict, the court has two options under this rule. It may order a new trial. Or it may enter judgment as though it had directed a verdict.

On appeal, we have similar options. We can remand for a new trial. Or we can order the district court to enter judgment as though it had directed a verdict for the movant. *In re Estate of Klein*, 241 Iowa 1103, 1119, 42 N.W.2d 593, 602 (1950).

A motion for judgment notwithstanding the verdict must stand or fall on the grounds stated in the motion for directed verdict. And, on appeal, our review is limited to those grounds. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990).

When considering a motion for directed verdict or for judgment notwithstanding the verdict, the district court must view the evidence in the light most favorable to the party against whom the motion is directed. This is so regardless of whether the evidence was contradicted. In addition such party is entitled to every reasonable inference from the evidence. Finally, if reasonable minds could differ on the issue, it is proper to submit it. *Larsen v.*

United Fed. Sav. & Loan Ass'n, 300 N.W.2d 281, 283 (Iowa 1981).

In reviewing the district court's ruling on such motions, we also view the evidence the same way. Simply put, we ask, was there sufficient evidence to generate a jury question? *Johnson*, 451 N.W.2d at 171.

In its motions for directed verdict and judgment notwithstanding the verdict, FLB argued that the Woods received all of the consideration promised to them – $76,500.

In contrast, the Woods contended that the money was not the total consideration. Part of the consideration – they urged – was that FLB would in fact through its mortgage have a valid "first security position" on the farm. And – they continued – in the event of default FLB would look first to the farm rather than to them personally. Because – they concluded – FLB did not have a valid first security position on the farm, there was a partial failure of consideration by FLB.

The Woods' argument to the district court – and to us – is really this. FLB should have made sure that the Woods were fee owners of the farm before taking the mortgage from them. Because the Woods' interest in the farm was less than a fee simple estate (full ownership), FLB would realize considerably less in the event of a default on the note and foreclosure of the mortgage. In these circumstances FLB would look to the Woods for any deficiency. Because FLB did not make sure that it took a mortgage on a fee simple estate, this constituted a partial failure of consideration.

Our analysis must begin with a definition of "consideration." This court has defined consideration as "a benefit to the promisor or a loss or detriment to the promisee." *Test v. Heaberlin*, 254 Iowa 521, 523, 118 N.W.2d 73, 74 (1962). The Iowa uniform jury instructions give this expanded definition:

> "Consideration" is either a benefit given or to be given to the person who makes the promise [or some other person] or a detriment experienced or to be experienced by the person to whom the promise is made [or some other person]. Where the contract provides for mutual promises, each promise is a consideration for the other promise.

II Iowa Civil Jury Instructions 2400.4 (1986).

Promissory notes are generally described as contracts. So, fundamental rules governing contract law apply in determining legal questions about such instruments, except as modified by statute. *Hart v. Hart*, 160 N.W.2d 438, 444 (Iowa 1968). Such legal questions include whether there is a lack or a failure of consideration.

There is a substantive difference between *lack* of consideration and *failure* of consideration. A lack of consideration means no contract is ever formed because no consideration exists or none was intended to pass. *Johnson*, 451 N.W.2d at 172; *Hart*, 160 N.W.2d at 444.

In contrast, a failure of consideration means the contract is valid when formed but becomes unenforceable because the performance bargained for has not been given. *Johnson*, 451 N.W.2d at 172; *Hart*, 160 N.W.2d at 444. In *Johnson* we described in detail what failure of

consideration could encompass and what remedies were available because of it:

> Failure of consideration covers every case where a contractual obligation is not performed irrespective of the fault of the breaching party. Thus, a failure of consideration may describe nonperformance which does not constitute a breach. A failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault, but is nonetheless a failure of consideration discharging the other party from his duty to perform under the contract, giving him the right to the restitution of payments already made or other benefits conferred.
>
> *Johnson*, 451 N.W.2d at 172.

Failure of consideration can be total or partial. *Hart*, 160 N.W.2d at 444. A partial failure of consideration occurs when "only a part or portion of the consideration originally contemplated by the parties actually moved from obligee to obligor." *Id.* A total failure of consideration, on the other hand, happens when a party has "failed or refused to perform a substantial part of what the party agree to do." *Johnson*, 451 N.W.2d at 172.

Our statutes recognize both. *See* Iowa Code §§ 537.3 (1973) (as to contracts generally) (now codified at section 537A.3); 554.3408 (as to commercial paper).

The Woods had the burden to prove partial failure of consideration. This is so because of Iowa Code sections 537.2 (now codified at section 537A.2) and 537.3. Section 537.2 declares that all written contracts signed by the party to be bound shall import a consideration. And

section 537.3 makes partial failure of consideration a defense. *See Chase Inv. Co. v. Kramer*, 243 Iowa 1369, 1372, 55 N.W.2d 467, 468 (1952). If there is substantial evidence to support the Woods' position on this issue, then the district court correctly submitted it. Absent such evidence it was error to do so.

Here the critical documents are the note and mortgage. Applying the definition of consideration to these documents, we must determine three things. First, what benefit to the Woods (the promisors) did the parties originally contemplate? Second, what detriment to FLB (the promisee) did the parties originally contemplate? Last, did any such benefit to the Woods or detriment to FLB in either document fail to materialize?

The pertinent language in the mortgage and note bearing on the first two questions is this:

The Mortgage

> Donald J. Woods and Lola Jean Woods, husband and wife . . . *in consideration of the advance of the principal sum recited in the note* hereinafter described, *receipt of which is acknowledged*, hereby mortgage and convey to [FLB] mortgagee, . . . the following described real estate [the farm].
>
> . . . .
>
> *This mortgage is given to secure a promissory note of even date herewith, executed by mortgagors to mortgagee, in the principal sum of seventy-six thousand five hundred and no/100 – dollars. . . .*

The Note

> *For value received, I/we* jointly and severally, as principals, *promise to pay to [FLB] . . . the principal sum of seventy-six thousand five hundred and no/100 – dollars. . . .*
>
> (Emphasis added.)

As the documents clearly show, the detriment to FLB originally contemplated by the parties is the $76,500 loan. The benefit to the Woods is the receipt of the $76,500.

The mortgage has no language suggesting that it – the mortgage – was a detriment to FLB originally contemplated by the parties. On the contrary, the mortgage language clearly states the mortgage is given by the Woods to secure the note.

In addition, the mortgage language suggests that the Woods warranted good title to FLB:

> The mortgagors, and each of them, hereby warrant that they are fee owners of the mortgaged real property. . . .

The testimony of Lola Jean Woods is consistent with the language in the two instruments. It also belies the Woods' claim that the parties originally contemplated additional consideration in the form of a valid first security position on the farm through the mortgage. Lola Jean testified in response to questions from her own attorney that her sole purpose in filling out the loan application was to obtain a loan from FLB. She also testified as follows about her purpose in going to FLB:

> Q. You went to the Federal Land Bank to obtain some money to complete this real estate transaction, is that fair? A. Yes.

> Q. What were you looking for when you went to the Federal Land Bank? A. Money.

Viewing the evidence in the light most favorable to the Woods, we find nothing in the record suggesting that the parties expected FLB to give the Woods anything more than the loan of $76,500.

What the Woods suggest is directly contrary to the way loans and mortgages are ordinarily handled. *See, e.g., Federal Land Bank v. Fetner,* 269 Pa.Super. 455, 410 A.2d 344 (1980). In *Fetner,* the appellant had borrowed money from the appellee-bank to buy a farm. The appellant was to execute and deliver to the bank a purchase-money mortgage on the farm. At the time of the loan closing, a third-party held an easement over a portion of the farm. Eventually the appellant fell behind in his payments and the bank foreclosed. On appeal of the foreclosure judgment, the appellant claimed, among other things, that the bank had a duty to tell him about the easement. The court disagreed, saying:

> There is no basis for appellant's conclusion that the bank or its mortgage procuring agent had any duty to search out defects in the title and disclose them to the appellant. Ordinarily, the relationship between the borrower and lender does not create a confidential relationship.

Id. at 461, 410 A.2d at 348.

In *Fetner* the court articulated the respective obligations of the parties in a mortgage transaction:

> *Ordinarily, there is no duty on the part of a lender to inspect the mortgaged property to determine that the borrower is obtaining that which he*

> *may have been promised by the vendor or that which he believes he is obtaining.* Unless some further obligation is assumed, *the lender's inspection of the premises to be mortgaged is made only to ascertain whether the property has sufficient value to secure the loan and is made by the lender for its benefit only.*
>
> Appellant did not contract with the bank to review the title; he did not advise the bank that he intended to rely on its inspection of the property; and no duty existed in law for the bank to learn of or disclose any matter which appellant might deem a defect. If appellant was defrauded by the . . . easement of which he avers he was unaware, the deception was not perpetrated by the bank and appellant's remedy must be sought elsewhere.

Id. (emphasis added). Simply put, the mortgage is for the benefit of the bank, not the borrower. If the bank chooses not to be concerned about the value of the collateral or the validity of the borrower's interest in the collateral, that is a risk the bank takes. The borrower cannot complain.

Here there is no record evidence that the parties contemplated anything out of the ordinary in the way this transaction was to be handled. The Woods knew the Mosers were making some claim even before FLB did. The Woods attempted to protect themselves from this potential claim in their offer to the Schmitts' trustee. They did so by inserting a provision in the offer that would allow them a return of their money if the Schmitts did not secure title to the farm.

In addition, the Woods hired their own attorney to examine the abstract, and he raised questions about the Mosers' claim. The sale closed because the Woods' attorney assured them that title to the farm was marketable. The Woods relied on their own attorney, not on FLB. Ultimately the Woods recovered judgment against their attorney for breach of contract in connection with his title examination and his representation of the Woods in the real estate closing. *Moser V,* 439 N.W.2d at 863-64. And they also recovered a default judgment against the Schmitts because the Schmitts had warranted title. *Id.* at 861.

There is no evidence that the Woods contracted with FLB to examine the abstract of title for them. To the contrary, FLB told the Woods they should have their own attorney do so. FLB did have its attorney examine title but that attorney's opinion was directed to FLB and not to the Woods.

On this record we find that reasonable minds could reach just one conclusion: the *only* consideration flowing from FLB to the Woods was the $76,500 loan and the Woods received it.

Indeed, there was a failure of consideration. But FLB was not responsible for that failure; the Woods were. And that consideration was one owed by the Woods to FLB. The Woods had warranted in the mortgage that they were fee owners of the farm. As it turns out, they were not.

The district court should have sustained FLB's motions for directed verdict and judgment notwithstanding the verdict on the partial failure of consideration defense. The court's failure to do so was error.

IV. *Unjustifiable Impairment of Collateral.*

In their cross-appeal, the Woods challenge the district court's finding that their defense of unjustifiable impairment of collateral was not available. In short, the Woods claim FLB unjustifiably impaired the collateral – the farm – by not making sure that the Woods had a fee simple estate before loaning the money and taking the note and mortgage. As we noted earlier, the Woods used this same argument to support their partial failure of consideration defense.

The Woods rely on Iowa Code sections 554.3601(1)(d) and 554.3606(1)(b). Those sections provide:

> Section 554.3601. *Discharge of parties.*
>
> 1. The extent of the discharge of any party from liability on an instrument is governed by the sections on
>
> . . . .
>
> d. impairment of right of recourse or of collateral (section 554.3606).
>
> Section 554.3606. *Impairment of recourse or of collateral.*
>
> 1. The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> . . . .
>
> b. unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

The short answer to the Woods' claim is that FLB did not impair the collateral. The collateral was impaired before FLB took its mortgage. The impairment – defect in title – did not arise because of anything FLB did or failed to do.

In addition, the note itself is a consent for the release of any party and any part of the collateral. On this point the note provides:

> Each of the persons signing this note hereby binds his or her separate estate, existing at the date of this note or hereafter acquired, for the payment of this note, and agrees that *any release of the security,* or of any person liable hereon *shall not operate as a release of any other signer,* endorser, surety, or guarantor of this note.

(Emphasis added.)

Finally, according to the Woods' own pleadings, this defense is predicated on FLB's *duty* to make sure the Woods would own the farm in fee simple. There was no such duty under the evidence in this record. The Woods – not FLB – had a duty to make sure they would have full ownership of the farm before they executed the note and mortgage. The Woods expressly warranted in the mortgage that they were the fee owners of the farm.

For all these reasons, we find no merit in the Woods' challenge to the district court finding on this issue.

V. *Expert Testimony About Violations of the Federal Farm Credit Act.*

Another issue raised by the Woods' cross-appeal centers on the district court's refusal to admit certain testimony from the Woods' expert, a lawyer. The Woods were attempting to predicate a negligence claim on alleged violations of the Farm Credit Act of 1971, more specifically, 12 U.S.C. section 2001 et seq. (1975). According to this provision, all loans originated or participated in by a federally chartered corporation like FLB "shall be secured by first liens on interests in real estate" used as collateral. 12 U.S.C. § 2017 (1975) (now codified at 12 U.S.C. § 2018 (1988)). The Woods wanted their expert to testify that (1) FLB did not have a first lien and (2) because it had no first lien, FLB violated the statute.

We think the district court properly refused to admit this testimony for several reasons.

First, the Woods were seeking a legal conclusion from the expert. Legal conclusions are peculiarly for the court to decide and not the jury. Preliminarily, the court decides whether a statute imposes a duty, the breach of which imposes liability for damages. If the court concludes there is such a duty, the court instructs on it and the jury determines whether the duty was breached.

Second, borrowers do not have an implied right of action for damages under the Farm Credit Act. Nor does violation of federal regulations under the Act give rise to a separate cause of action under state tort law. *Production Credit Ass'n v. Ista*, 451 N.W.2d 118, 123-24 (N.D.1990) (reviewing a long line of cases, federal and state, holding

that there is no implied right of action for violation of the Farm Credit Act).

Last, FLB did not violate the express terms of the Act. FLB had a valid first lien against the Woods' interest, albeit such interest was less than a fee simple estate.

VI. *Attorney Fees.*

That brings us to the last issue. In its appeal, FLB contends the district court erred when the court refused to award it attorney fees. This was the court's reasoning:

> The note on which this action rests does include a provision which states "reasonable attorney fees may be collected as a part of this indebtedness in any legal proceeding brought to enforce the collection. . . . " Under normal circumstances, an award of attorney fees would be appropriate with respect to the Bank's action to enforce the note. However, in this case the jury found in favor of the affirmative defense raised by the Woods and they were justified in contesting the Bank's action to enforce the note. Under these circumstances, it would be impossible to determine what part, if any, of the Bank's attorney fees were *reasonably* necessary to obtain payment of the note. It is concluded that where, as here, a person successfully defends himself as to a substantial portion of the payee's action on a note, the provisions in the instrument for payment of attorney fees by the borrower are no longer valid.

We pass on the question whether the district court should deny attorney fees completely when there has been a successful partial defense against the note. We do

so because under the result we reach here, there has been no successful partial defense. FLB is entitled to recover the full amount of the note. In these circumstances, FLB is entitled to attorney fees for legal services in establishing its own claim and in defending against the counterclaims and affirmative defenses.

In addition, we agree with FLB that it is entitled to appellate attorney fees because the attorney fee language in the note does not prohibit such fees. *See Banker's Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982).

We reject the Woods' contention that the award of attorney fees must be governed by the version of section 625.22 in effect when the note was signed (1975), rather than the version in existence at the time of judgment (1990). (The 1975 version allowed attorney fees based on a graduated percentage of the judgment. The 1989 Code simply allows "a reasonable attorney's fee.") The Woods' contention is directly contra to what we held in *Woltz:*

> [T]he right to attorney fees and costs . . . depends upon the statute in force at the termination of the proceedings. . . . [N]o party is entitled to costs *until a judgment is recovered.*

Woltz, 326 N.W.2d at 278 (emphasis added).

We must remand this case to the district court. On remand the district court shall hold an evidentiary hearing on trial and appellate attorney fees. In addition the district court shall fix those fees. We note that FLB waives attorney fees for proceedings in this case before March 1987 because of a change in counsel. It asked the trial court to allow fees from March 1987 through October 26,

1989. So as to trial court attorney fees the district court should use this time frame.

VII. *Disposition.*

The district court erred when it denied FLB's motions for directed verdict and judgment notwithstanding the verdict on the Woods' defense of partial failure of consideration. The court also erred in not awarding FLB reasonable attorney fees. We therefore reverse the judgment of the district court reducing FLB's recovery on the note by the amount of the set-off. We also reverse the judgment denying FLB attorney fees.

Because it appears that material facts relating to the partial failure of consideration defense were fully developed at the trial, we think the "ends of justice would not be served by awarding a new trial." *In re Estate of Klein,* 241 Iowa at 1119, 42 N.W.2d at 602. We therefore remand this case to the district court which shall enter judgment for FLB as if either motion had been sustained. In addition, the court shall enter judgment for FLB against the Woods for the full amount of the note and interest. Finally, following an evidentiary hearing, the court shall fix trial court attorney fees as well as appellate attorney fees.

The district court correctly found against the Woods on their defense of unjustifiable impairment of collateral. The court also properly excluded the expert's opinion about the Farm Credit Act. We therefore affirm on the Woods' cross-appeal.

The parties raised other issues and arguments. We have carefully considered them but find that they are either moot or lack merit.

Costs are taxed to the Woods.

REVERSED ON THE APPEAL AND REMANDED WITH DIRECTIONS; AFFIRMED ON THE CROSS-APPEAL.

IN THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY

FEDERAL LAND BANK OF OMAHA, Plaintiff, v. DONALD J. WOODS and LOLA JEAN WOODS, Defendants.	Case No. 38977 Judgment (Filed Aug. 24, 1994)

Pursuant to the procedendo issued by the Supreme Court of Iowa on the decision entered by the Supreme Court on July 24, 1994, remanding the case to this court for the purpose of entering an additional judgment for attorney fees as a result of the last appeal, judgment is now entered for the Plaintiff against the Defendants in the sum of $15,172.

The Clerk shall furnish copies of this order to counsel.

Dated August 23, 1994.

/s/ L. D. Lybbert
L. D. Lybbert, Judge

IN THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY

THE FEDERAL LAND BANK OF OMAHA, A CORPORATION, Plaintiff, vs. DONALD J. WOODS, AND LOLA JEAN WOODS, Defendants.	)	Case No. 38977 ORDER NUNC PRO TUNC (Nov. 10, 1992)

It has been called to the court's attention that this court's decision and order on remand for determination of attorney fees dated November 5, 1992, failed to include a judgment for the note and interest as required by the mandate from the Iowa Supreme Court.

Judgment is now entered for the plaintiff against the defendants for the amount of principal and interest due as of May 4, 1990, in the sum of $128,469.57 with interest thereon from that date in the sum of ten percent per annum in addition to the judgment previously entered for attorney fees.

Dated this 9th day of November, 1992.

/s/ L. D. Lybbert
L. D. Lybbert, Judge
First Judicial District of Iowa

IN THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY

THE FEDERAL LAND BANK OF OMAHA A Corporation Plaintiff, vs. DONALD J. WOODS, and LOLA JEAN WOODS, Defendants.	)	Case No. 38977 DECISION AND ORDER ON REMAND FOR DETERMINATION OF ATTORNEY FEES

The Iowa Supreme Court remanded this case to the undersigned court to determine the amount of attorney fees that defendants shall be ordered to pay plaintiff in connection with the trial and appeal of plaintiff's action to obtain payment on defendant's promissory note. The determination has been greatly delayed because of defendants filing bankruptcy proceedings in Federal Court that resulted in a stay of this matter.

Plaintiff claims it is entitled to over $39,000 attorney fees, and has submitted in evidence its attorney's billings totaling that amount. Defendants contend (1) that the portion of the attorney fees expended in defending against the affirmative defense and counterclaim of the defendants should not be allowed because they were not incurred to "enforce collection"; (2) that the number of hours expended by plaintiff's attorney was unreasonable; (3) that the hourly rate charged by plaintiff's attorneys are unreasonable; and (4) that the Iowa Supreme Court acted unconstitutionally in ordering the assessment of attorney fees against the defendants. Lastly, defendants contend that plaintiff is not entitled to attorney fees in

connection with the bankruptcy proceedings defendants initiated that included plaintiff's judgment in this case as well as plaintiff's claim for attorney fees.

It is held that defendants' contention regarding plaintiff's attorney fees in defending against defendants' counterclaim and affirmative defenses is not valid. On page 20 of the slip copy of its decision filed January 22, 1992, the Iowa Supreme Court held:

> "In these circumstances, FLB is entitled to attorney fees for legal services in establishing its own claim *and in defending against the counterclaims and affirmative defenses.*

Defendants' contention that the Iowa Supreme Court acted unconstitutionally in holding that plaintiff is entitled to such attorney fees is also without merit. The recovery of such attorney fees and expenses were provided for in the note defendants signed. Further, this court has no jurisdiction to adjudge any part of a decision of the Iowa Supreme Court to be unconstitutional.

In compliance with the Iowa Supreme Court mandate, this court has held an evidentiary hearing to determine and fix the amount of trial and appellate attorney fees plaintiff is entitled to recover as a part of its judgment against the defendants. Plaintiff paid its attorneys $13,630.33 for legal services from March 1987 through October 26, 1989, prior to the start of the trial of the case. Plaintiff has paid its attorney the additional sum of $22,429.91 for attorney fees from October 26, 1989, through March 5, 1992, (the date of the procedendo from the Iowa Supreme Court) in connection with the trial and appeal. These amounts total $36,056.69. All but $2,699 of

that amount was for fees at the rate of $75 per hour. The hourly rate for the last $2,699 was $85.

The court has scrutinized the 24 billings and finds that the amount per hour charged as well as the number of hours charged were reasonbale [sic] except for the following items: The sum of $996 included in the $22,429.91 billings for printing costs and docketing fees on the appeal. Presumably those items were taxed as costs in the appeal and will be included in the Clerk's taxation of costs. Eighteen hours of time charged was for the attorney's travel time expended in the course of the trial and appeal. The rate charged was the same as charged for legal services. It is found that one-half of the rate charged for legal services is reasonable for travel time and this results in a reduction of $710.00 from the total amount claimed. Therefore, the sum of $1,706.00 is deducted from the total attorney fees and expenses of $36,060.24 which results in a determation that plaintiff is entitled to recover the sum of $34,354.14 as attorney fees and expenses for the trial and appeal of this case.

Plaintiff claims another $2,051.81 attorney fees paid to its attorneys in obtaining an order from the bankruptcy judge relieving the judgment and claim for attorney fees in this action from the stay of the bankruptcy proceedings and later obtaining an order on June 25, 1992, dismissing defendants' Chapter 12 Bankruptcy Petition. It is noted in the copy of the transcript of the dismissal hearing provided to this court by counsel for the plaintiff on July 10, 1992, that the then Chief Bankruptcy Judge, the Honorable Michael J. Melloy, found that defendants' Chapter 12 Bankruptcy Petition was filed in bad faith. At the hearing on the remand to determine and fix attorney fees, counsel

for plaintiff indicated that he had not made application for the payment of plaintiff's attorney fees as a sanction in the bankruptcy proceedings.

Although a tenable argument can be made that plaintiff's attorney fees expended in the bankruptcy proceedings falls within the language contained in the note providing for the borrower paying the lender's attorney's fees and expenses to enforce repayment of the loan after default, these expenses are clearly not within the language of the Iowa Supreme Court's mandate to this court. The remand only provided for a determination and fixing of the attorney fees expended in the trial and appeal of the case in the District and Supreme Court of Iowa. Plaintiff's claim for such attorney fees in this action is DENIED.

Accordingly, plaintiff's attorney fees that shall be included in plaintiff's judgment against the defendants is fixed in the sum of $34,354.14.

Dated this 5th day of November, 1992.

/s/ L. D. Lybbert
L. D. Lybbert, Judge
First Judicial District of Iowa

IN THE DISTRICT COURT OF IOWA,
IN AND FOR FAYETTE COUNTY

FEDERAL LAND BANK OF OMAHA Plaintiff, v. DONALD J. WOODS and LOLA JEAN WOODS, Defendants.	)	CASE NO. DEFENDANT'S RESPONSE REGARDING ATTORNEY'S FEES (Filed Jun. 29, 1992)

COMES NOW the Defendant's Donald J. Woods and Lola Jean Woods and for their Response and Answer to the Plaintiff's, Federal Land Bank's Application for Assessment of Attorney's Fees state as follows:

1. That the Defendants admit that under the decision of the Iowa Supreme Court, the Plaintiff's are entitled to attorney's fees.

2. That the Promissory Note provided that "Reasonable attorneys fees may be collected as a part of this indebtedness in any legal proceeding brought to enforce collection (except where prohibited by law).

3. That under the construction of the provision of the Promissory Note, the awarding of attorney fees is discretionary with the Trial Court, since the word "may" was used. Based on the conduct of the Federal Land Bank, the court should use it discretion to deny attorney's fees.

4. As an additional grounds [sic] for the Defendant's resistance, the language which was chosen by the Federal Land Bank with regard to attorney's fees is "in any legal proceeding brought to *enforce* collection." To date, all of the attorney's fees incurred by the Federal Land Bank has been directed to obtaining the judgment. None of its fees have been incurred to "enforce collection". Thus, the court is limited to allowing fees for enforcing the judgment by collection.

5. As an additional ground for the Defendant's resistance, Defendant point [sic] out that during the pretrial conferences the attorney's fees were discussed. At one of the conference's Federal Land Bank's attorney conceded that the attorney's fees provision was limited to the action on the Promissory Note, and, thus, were not applicable to attorney's fees by Federal Land Bank which were incurred in defense of Defendants counterclaim. Defendants Woods also content [sic] that no attorney's fees should be awarded for time spent by FLB's attorney with regard to the affirmative defenses plead by Defendants.

6. That the Court, in its opinion of May, 1989, whereat the Court provided at page XX. The Supreme Court did not overrule that portion of the Court's ruling, but only indicated that the Court would have to consider FLB consideration of attorney's fees.

7. That the Iowa Supreme Court has acted unconstitutionally in that its ruling on attorney's fees has taken property from the Defendants Woods without just and adequate compensation. This is a violation of their Constitutional Rights of due process and equal protection under the 4th and 14th Amendments to the United States

Constitutions, and Article I., Sections 6 and 9 of the Iowa Constitutions. It also violated the Defendant's Constitutional Right to freely contract, and to construe the contract in accord with the terms of the contract, and with the law as it was at the time the contract was entered into by the parties.

8. That the issues regarding the Constitutionally [sic] of construing that the modification of Statute violated the Defendant's constitutional rights as set forth above was properly raised by Defendants at the time that they filed there [sic] Motion to Adjudicate Law Points at the District Court level. It was also raised in reply to FLB's contention that the entity was entitled to attorney's fees by the Defendants' Woods at the Supreme Court. The Supreme Court failed to address this contention in its ruling. By failing to address this contention, the Court is allowing this Court to reconsider the Woods [sic] position regarding this issue.

9. That the hourly rate set forth in the bills of FLB's attorney is not appropriate in this matter, and not a rate which he should be allowed.

WHEREFORE, the Defendant's Donald J. Woods pray the Trial Court to use its discretion to award attorney's fees by awarding only nominal fees, or fees in accord with the previous provisions of the attorney's fees statute.

IT IS FURTHER PRAYED that the Court construe the provisions of the Promissory Note to limit the FLB's attorney's fees to "any legal proceeding brought to *enforce* collection."

IT IS PRAYED in the alternative, that the Court hold the ruling by the Iowa Supreme Court with regard to attorney's fees as unconstitutional on the grounds set forth herein.

Respectfully submitted,

/s/ Larry F. Woods
Larry F. Woods
Attorney at Law
24 North Frederick Avenue
Oelwein, IA 50662
319/283-3204

ATTORNEY FOR THE DEFENDANT, DONALD J. AND LOLA JEAN WOODS

Original filed with the Fayette County Clerk of Court

cc: Dale Putnam
Attorney at Law
P. O. Box 70
Decorah, Ia. 50677

The Honorable L. D. Lybbert
Judge, First Judicial District
Black Hawk County Courthouse
Waterloo, Ia. 50703

WOODS REPLY BRIEF TO IOWA SUPREME COURT THAT IS RELEVANT FOR CASE AT 480 N.W.2d 61

BRIEF POINT III

THE TRIAL COURT CORRECTLY RULED THAT NO ATTORNEY'S FEES SHOULD BE GRANTED TO FLB.

AUTHORITIES

Section 625.22, The Code (1975)
Section 625.22, The Code (1989)
Moser I through V: 256 N.W.2d 900 (Iowa 1978); 312 N.W.2d 881 (Iowa 1981); 334 N.W.2d 715 (Iowa 1983); 400 N.W.2d; 439 N.W.2d 885 (Iowa 1989)

Condemnation of Certain Lands v. City of Des Moines, 119 N.W.2d 187 (Iowa 1963)

Merrill Lynch v. Knudsen, 749 F.2d 496

ARGUMENT

The Trial Court held that FLB was not entitled to attorney's fees in this matter. The Trial Court did so, though the note provided as follows: "Reasonable attorney's fees may be collected as part of this indebtedness in any legal proceedings to enforce collection (except where prohibited by law)." The Court held, "the jury found in favor of the affirmative defense raised by Woods and they were justified in contesting the Bank's action to enforce the note. Under these circumstances, it was impossible to determine what part, if any, of Bank's attorney's fees were *reasonably* necessary to obtain payment of the note." The Court continues that where, as in this case, a person

successfully defends himself to a substantial portion of the payee's action, the provisions of the instrument of payment of attorney's fees by the borrower are no longer valid. (Court Ruling of April 26, 1970, Page 17)

The Court previously set forth holdings are justified based on the record, the jury's finding of an affirmative defense and the time it took FLB to present its evidence on its case in chief on the note. The Court Trial Transcript shows that both FLB case in chief and cross-examination started at 10:20 A.M. and ended at 12:30 P.M. (Trial Court Transcript pp. 1 and 75). All remaining days of trial were devoted to the Woods' affirmative defenses and the Woods' Counterclaims. Section 625.22 does not contemplate and does not authorize the attorney representing it on the note to collect any of its attorney's fees for defense to the Counterclaims or for attempting to rebut the affirmative defenses. Thus, the Court's statement that it would be impossible to determine what part, if any, of the Bank's fees were reasonably necessary to obtain payment on the note, is clearly based in fact and reason.

As this Court is well aware, because of the previous litigation of the cases of *Moser I through V* and the summary reversal of potential Moser VI, this is a highly unusual, highly litigated and entirely new area of law, not only for the Iowa Courts, but for the Courts throughout the land. Attorney's fees are to be taxed as part of the Court costs under Section 625.22. The Trial Court has wide latitude and discretion in taxing the Court costs. *Condemnation of Certain Lands v. City of Des Moines,* 119 N.W.2d 167 (Iowa 1963). In order for the Trial Court to be reversed, Defendants, Woods, contend that FLB must show the Trial Court abused its discretion. The extensive

record in this matter shows that the Trial Court did not abuse its discretion, its rationale for not allowing attorney's fees is sound and the Court's ruling should be upheld.

Even if FLB were awarded to attorney's fees, those fees would be limited by the ruling on Woods' Motion to Adjudicate Law Points. Woods previously filed a Motion to Adjudicate Law Points on February 9, 1989. The basis of that motion was to determine which provision of Sections 625.22 were applicable, since the statute had been amended between the time the note was originally signed in March of 1975, and the date FLB filed its Petition. In March 1975, Iowa Code Section 615.22 provided as follows:

> "When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as part of the costs:
>
> 1. On the first two hundred dollars or fraction thereof recovered, ten percent.
>
> 2. On the excess of two hundred to five hundred dollars, five percent.
>
> 3. On the excess of five hundred to one thousand dollars, three percent.
>
> 4. On all sums in excess of one thousand dollars, one percent."

The Woods' Motion specifically requested the Court to determine whether Section 625.22, as it appears in 1975, or the section as modified in 1981, was the applicable section to determine what attorney's fees FLB might collect. The Court held that the applicable section was the

one in effect on the date of signing the agreement, to-wit: March 24, 1975, as stated above. (Ruling filed April 19, 1989) The lower Court based its decision that Section 625.22 of the Code as it appeared in 1975 was applicable, based on an Eighth Circuit Court of Appeals opinion. In the case of *Merrill Lynch v. Knudsen,* 749 F.2d 496, the identical issue was presented to the Eighth Circuit Court of Appeals, and the Eighth Circuit, without delving into the constitutional issues, ruled that attorney's fees on a promissory note were governed by the statute in effect at the time of the contract, rather than a subsequently amended statute.

Thus, even if the Trial Court erred in failing to grant attorney's fees, FLB's attorney's fees would be limited as provided by Section 625.22 of the Iowa Code (1975). Since the FLB did not appeal the decision which held that the 1975 version of Section 625.22 was applicable by mentioning it in its Brief, the maximum amount of attorney's fees is limited to those under the 1975 Code.

* * *

IN THE DISTRICT COURT OF IOWA,
IN AND FOR FAYETTE COUNTY

FEDERAL LAND BANK OF OMAHA, Plaintiff, v. DONALD J. WOODS and LOLA JEAN WOODS, Defendants-Counterclaimants.	CASE NO. 38977 MOTION TO ADJUDICATE LAW POINTS (Filed Feb. 19, 1990)

COME NOW the Defendants-Counterclaimants, Donald J. Woods and Lola Jean Woods, and hereby applies to the Court to adjudicate certain law points in the above-entitled matter. The factual basis of the adjudication is set forth below. The issues presented to the Court are then set forth thereafter. For purposes of this Motion, the Defendants-Counterclaimants, Donald J. Woods and Lola Jean Woods, state that the Court should deem the following as true and correct:

1. That on or about the 24th day of March, 1975, the Plaintiff, Federal Land Bank, loaned to the Defendants, Donald J. Woods and Lola Jean Woods, the sum of $76,500.00

2. That subsequently, the Defendants, Donald J. Woods and Lola Jean Woods, repaid to the Federal Land Bank the following sums on the following dates:

A. On March 24, 1975, the Defendants paid $28,026.00

B. On the 1st day of March, 1976, the Defendants paid $9,049.51 of which $2,700.00 was principal and $6,349.51 was interest.

C. That the total balance on said loan on September 1, 1977, at the time any alleged default occurred because of the [sic] was $43,074.00 plus interest of $1,884.49.

3. That at the time of the loan, there was a Mortgage and a Promissory Note executed by the Defendants, which instruments provided for recovery of "reasonable attorney's fees".

4. That at the time both the Mortgage and the aforesaid Promissory Note were executed by the Defendants-Counterclaimants, Section 625.22 of the Iowa Code (1975) regarding Attorney's Fees provided as follows:

> "When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the Court shall allow and tax as part of the costs:
>
> 1. On the first $200.00 or fraction thereof recovered, 10%;
>
> 2. On the excess of $200.00 to $500.00, 5%;
>
> 3. On the excess of $500.00 to $1,000.00, 3%;
>
> 4. On all sums in excess of $1,000.00, 1%.

5. That in the above-entitled matter, the Defendants have field a Counterclaim, and that a significant amount of the time of the attorney for the Federal Land Bank has been spent in preparation and response to the Counterclaimant's claim.

6. That only for purposes of this Motion to Adjudicate Law Points, the the Court should deem as true the facts set forth in paragraphs 1 through 5 above.

7. That the Court should adjudicate the law points set forth hereafter.

8. That whould [sic] adjudicates whether the attorney's fees which the Plaintiff, Federal Land Bank of Omaha, could receive is limited to the attorney's fees as provided by Section 625.22. (1975) which is set forth above in Paragraph 4, and which was in effect on the date of execution of the Mortgage and Promissory Note.

9. That in the event that the Court does not limit the attorney's fees to those as set forth in Paragraph 4 above, then the Court should determine whether attorney's fees could be awarded to the Federal Land Bank of Omaha for the time that the Federal Land Bank of Omaha's attorney has spent in preparation for and defense of the Counterclaimant's claim in the above-entitled matter.

9. [sic] That the Court should adjudicate the law points set forth in this Motion and hold that the Federal Land Bank is limited to attorney's fees under Section 625.22 as it appeared at the time of execution of the Mortgage and Promissory Note, to-wit, 1975 at the time of the default in September of 1977.

10. In the eevent [sic] that the Court does not limit the Plaintiff's attorney's fees as requested in paragraph 9 above, the Court should determine that the attorney's fees for the Federal Land Bank should be limited only to those for its cause of action against the Defendants, Donald J. Woods and Lola Jean Woods, and that the

Federal land Bank not be entitled to recover attorney's fees under Section 625.22 or the written contract in any amount for the time expended to defend the Counterclaim of the Counterclaimants, Donald J. Woods and Lola Jean Woods.

WHEREFORE, the Counterclaiments, Donald J. Woods and Lola Jean Woods pray the Court to adjudicate the law points set forth in this Motion.

IT IS FURTHER PRAYED that the Court should hold that the Federal Land Bank is limited to attorney's fees under Section 625.22 as it appeared at the time of execution of the Mortgage and Promissory Note, to-wit, 1975 at the time of the default in September of 1977.

IT IS FURTHER PRAYED that in the event the Court does not limit the Plaintiff's attorney's fees as requested in paragraph 9 above, the Court should determine that the attorney's fees for the Federal Land Bank should be limited only to those for its cause of action against the Defendants, Donald J. Woods and Lola Jean Woods, and that the Federal Land Bank not be entitled to recover attorney's fees under Section 625.22 or the written contract in an [sic] any amount for the time expended to

defend the Counterclaim of the Counterclaimants, Donald J. Woods and Lola Jean Woods.

Respectfully submitted,

/s/ Larry F. Woods
Larry F. Woods
Attorney at Law
24 North Frederick Avenue
Oelwein, IA 50662
319/283-3204

ATTORNEY FOR THE DEFENDANTS-COUNTERCLAIMANTS, DONALD J. WOODS AND LOLA JEAN WOODS

Original filed with the Fayette County Clerk of Court.

cc: Dale L. Putnam
Attorney at Law
P.O. Box 70
Decorah, IA 52101

Michael Lacey, Jr.
Attorney at Law
729 Insurance Exchange Bldg.
Des Moines, IA 50319

The Honorable William G. Klotzbach
Buchanan County Courthouse
Independence, IA 50644

IN THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY

FEDERAL LAND BANK OF OMAHA, Plaintiff, vs. DONALD J. WOODS and LOLA JEAN WOODS, Defendants.	Case No. 38977 RULINGS ON MOTIONS (Filed April 19, 1989)

On February 20, 1989, hearing was held on pending matters. Appearing were Dale Putnam on behalf of the plaintiff and Larry Woods on behalf of the defendants.

Arguments were presented and the Court now makes the following rulings.

I

Plaintiff's Motion in Limine filed August 19, 1988, is sustained to the extent that the defendants shall not comment in opening statement or introducing evidence in defendants' case in chief on plaintiff's alleged failure to comply with their own internal regulations as found in the Code of Federal Regulations.

II

Plaintiff's Motion for Leave to Amend Reply to Counterclaim filed February 8, 1989, is sustained.

III

The defendants' Motion to Adjudicate Law Points filed February 10, 1989, is sustained; and, in the event plaintiff obtains a judgment against defendants, the Court may assess attorney fees upon the amount of the judgment based on the promissory note. Said fees shall be calculated upon the statute pertaining to attorney fees at the date of the execution of the note. Said fees shall be limited to the recovery based on the note, and no fees shall be allowed for the defense of the counterclaim.

IV

Hearing on defendants' Motion to Adjudicate Law Points filed February 20, 1989, shall be set after the Iowa Supreme Court has ruled on pending mattrs [sic] upon request of either party.

Done and Ordered this 17th day of April, 1989.

BY THE COURT:

/s/ William G. Klotzbach
Judge, First
Judicial District
of Iowa

625.22 Attorney's fees

When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs:

1. On the first two hundred dollars or fraction thereof recovered, ten percent.

2. On the excess of two hundred to five hundred dollars, five percent.

3. On the excess of five hundred to one thousand dollars, three percent.

4. On all sums in excess of one thousand dollars, one percent.

625.22. Attorney's fees – costs

When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court.

In an action against the maker to recover payment on a dishonored check or draft, as defined in section 554.3104, the plaintiff, if successful, may recover, in addition to all other costs or surcharges provided by law, all court costs incurred, including a reasonable attorney's fee, or an individual's cost of processing a small claims recovery such as lost time and transportation costs from the maker of the check or draft. However, lost time and

transportation costs of an assignee shall not be awarded under section 631.14 to a person who in the regular course of business takes assignments of instruments or accounts pursuant to chapter 539. Only actual out-of-pocket expenses incurred in obtaining the small claim recovery may be awarded to the assignee. Any additional charges shall be determined by the court. If the defendant is successful in the action and the court determines the action was frivolous, the court may award the defendant reasonable attorney's fees.

Amended by Acts 1980 (68 G.A.) ch. 1182, § 1; Acts 1984 (70 G.A.) ch. 1217, § 2; Acts 1987 (72 G.A.) ch. 137, § 2.

1980 Amendment: Authorized reasonable attorney's fees determined by the court rather than fixed percentages, and added the paragraph relating to recovery for violations of Chapter 714.

1984 Amendment: Rewrote the second paragraph, relating to actions to recover on dishonored checks, which formerly read:

"In an action against the maker to recover payment on a check, draft, or written instrument written in violation of chapter 714, the plaintiff, if successful, may recover all court costs incurred, including a reasonable attorney's fee, or an individual's cost of processing a small claims recovery such as lost time and transportation costs from the maker of the check, draft, or written instrument."

§ 2018. Security; terms

(a) Real estate loans

(1) Maximum level of loans

(A) In general

Real estate mortgage loans originated by a Farm Credit Bank, or in which a Farm Credit Bank participates in with a lender that is not a System institution, shall not exceed 85 percent of the appraised value of the real estate security, except as provided for in paragraphs (2) and (3).

(B) Regulation

The Farm Credit Administration may, by regulation, require that loans not exceed 75 percent of the appraised value of the real estate security.

(C) Guaranteed loans

If the loan is guaranteed by Federal, State, or other governmental agencies, the loan may not exceed 97 percent of the appraised value of the real estate security, as may be authorized under regulations of the Farm Credit Administration.

(2) Security

All loans originated or participated in by a bank under this section shall be secured by first liens on interests in real estate of such classes as may be prescribed by regulations of the Farm Credit Administration.

(3) Value of security

To adequately secure the loan, the value of security shall be determined by appraisal under standards prescribed by the bank in accordance with regulations of the Farm Credit Administration.

(4) Additional security

Additional security for any loan may be required by the bank to supplement real estate security. Credit factors, other than the ratio between the amount of the loan and the security value, shall be given due consideration.

(5) Financial statement

Each Farm Credit Bank shall require a financial statement from each borrower at least once every 3 years, or during such shorter period of time as may be required under regulations of the Farm Credit Administration.

(b) Intermediate credit

Loans, other than real estate loans, and discounts made under the provisions of this subchapter shall be repayable in not more than 7 years (15 years if made to producers or harvesters of aquatic products) from the time that such are made or discounted by the Farm Credit Bank, except that the Board of Directors, under regulations of the Farm Credit Administration, may approve policies permitting loans, advances, or discounts (other than those made to producers or harvesters of aquatic products) to be repayable in not more than 10 years from the time that such are made or discounted by such bank.

(Pub.L. 92-181, Title I, § 1.10, as added Pub.L. 100-233, Title IV, § 401, Jan. 6, 1988, 101 Stat. 1627, and amended

Pub.L. 100-399, Title IV, § 401(h), (i), Aug. 17, 1988, 102 Stat. 996.)

(2)

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-927

In The

Supreme Court of the United States

October Term, 1994

DONALD J. WOODS AND LOLA JEAN WOODS,

Petitioners,

v.

FEDERAL LAND BANK OF OMAHA,

Respondent.

On Petition For Writ Of Certiorari
To The Iowa Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

HARRY W. ZANVILLE
Counsel of Record
Attorney at Law
3116 Brockway Road
Waterloo, IA 50701
(319) 232-1404

Counsel for the Respondent,
Federal Land Bank of Omaha

DALE L. PUTNAM
Attorney at Law
518 Montgomery St.
P.O. Box 70
Decorah, IA 52101
(319) 382-2984

Counsel for the Respondent,
Federal Land Bank of Omaha

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pd

QUESTION PRESENTED

Was the Iowa Supreme Court correct in following its prior rulings holding that since attorney fees on a contract allowing for the collection of attorney fees are part of the costs, and the successful party is not entitled to costs until judgment is entered, then the statute in effect at the time judgment is entered is controlling?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTES INVOLVED 1

COUNTER STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING THE WRIT 5

I. THE WRIT SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THE WRIT, AND THE CASE DOES NOT PRESENT SIGNIFICANT LEGAL ISSUES OR OTHER SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT 5

II. THE WRIT SHOULD BE DENIED BECAUSE THIS CASE DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE UNITED STATES COURT OF APPEALS 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES CITED:

Banker's Trust Company v. Woltz, 326 N.W.2d 274 (Iowa, 1982) 3, 4, 6, 9

Federal Land Bank v. Woods, Decided July 27, 1994 .. 4, 7, 8

Federal Land Bank v. Woods, 480 N.W.2d 61 (Iowa, 1992) 3, 4, 7, 8

Holiday Inns Franchising, Inc. v. Branstad, 29 F.3rd 383 (8th Cir., 1994) 7

McDonald Corporation v. Nelson, 822 F. Supp. 597 (Iowa N.D. 1994) 7

Merrill Lynch v. Knudsen, 749 F.2d 496 (8th Cir., 1984) 5, 9

Merrill Lynch, Pierce, Fenner and Smith v. Knudsen, 718 F.2d 1107 Slip Op. at 2 (8th Cir., 1983) 5, 9

STATUTES AND REGULATIONS:

Section 625.22 of the Iowa Code (1975) 1, 6, 7

Section 625.22 of the Iowa Code (1980) 6, 7

RULES CITED:

Supreme Court Rule 13 4

APPENDIX

Appendix A – Promissory Note ..... App. A1

District Court Ruling ..... App. A4

No. 94-927

In The

Supreme Court of the United States

October Term, 1994

DONALD J. WOODS AND LOLA JEAN WOODS,

Petitioners,

v.

FEDERAL LAND BANK OF OMAHA,

Respondent.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Federal Land Bank of Omaha, respectfully submits this Brief in Opposition to the Petition For a Writ of Certiorari of Donald J. Woods and Lola Jean Woods, Petitioners.

STATUTES INVOLVED

This case involves Section 625.22 of the Iowa Code (1975) which provides as follows:

> When judgment is recovered upon a written contract containing an agreement to pay an

attorney's fee, the Court shall allow and tax as part of the costs:

1. On the first two hundred dollars or fraction thereof recovered, ten percent.

2. On the excess of two hundred to five hundred dollars, five percent.

3. On the excess of five hundred to one thousand dollars, three percent.

4. On all sums in excess of one thousand dollars, one percent.

The statute was changed in 1980. The relevant portion of the statute provided as follows:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the Court shall allow and tax as part of the costs a reasonable attorney's fees to be determined by the Court.

COUNTER STATEMENT OF THE CASE

On February 26, 1975, the Petitioners, Donald and Lola Woods, (Woods) executed a variable interest rate note with the Respondent, Federal Land Bank of Omaha (FLB) (App. A). The note specifically provided: "Reasonable attorney fees may be collected as a part of this indebtedness in any legal proceeding brought to enforce collection (except where prohibited by law). An action for collection was initiated by FLB. The jury found in favor of the Woods on an affirmative defense, and the Trial Court set the amount of the judgment for FLB after off-setting the affirmative defense. The Trial Court did not award

attorney fees pursuant to the note as the Trial Court deemed it impossible to reasonably determine what attorney fees were necessary to obtain payment on the note, and concluded that where there is a successful defense to a portion of the action on a note, the provisions in the instrument for payment of attorney fees are no longer valid. (App. B-D).

Prior to the Trial, the Petitioners had filed an Adjudication of Law Points asking the Court to determine whether Iowa Code Section 625.22 as existed at the time of the execution of the note or as it existed following the 1980 amendment was the controlling Section. No allegations of Constitutional rights were raised in the Adjudication of Law Points. (App. 44-48).

FLB appealed the Trial Court's submission of the affirmative defense to the jury and failure to award attorney fees. The Supreme Court of Iowa reversed and remanded finding that the Trial Court should not have submitted the affirmative defense and that FLB was entitled to an award of attorney fees. *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992). The Woods failed to raise any Constitutional allegations in their Reply Brief to the Iowa Supreme Court. (App. 40-43). The Supreme Court followed its previous Ruling in *Banker's Trust Company v. Woltz*, 326 N.W.2d 274 (Iowa, 1982) wherein the Court held that the right to attorney fees are costs and do not vest upon signing the Contract or upon initiation of the action, but only upon recovery, and accordingly, the Statute in existence at the time of recovery is controlling as to the award of attorney fees. *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992). Woods did not file for a Writ of Certiorari challenging the Iowa Supreme Court

following its Ruling. Accordingly, this Court lacks jurisdiction to hear the Writ. (Supreme Court Rule 13)

For the first time, in resistance to FLB's request to set attorney fees and enter judgment, the Woods alleged Constitutional violations. The Trial Court properly followed the Supreme Court's prior Ruling, and Woods once again appealed to the Iowa Supreme Court. (App. 33) The Iowa Supreme Court affirmed the District Court as Woods were attempting to relitigate on a new legal theory an issue that had previously been decided by the Iowa Supreme Court, which was the law of the case. (App. 5)

SUMMARY OF THE ARGUMENT

The Petitioners, Woods, failed to raise any Constitutional questions regarding the Application of Section 625.22 of the Code of Iowa to the Trial Court or Supreme Court of Iowa in *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992). No Petition For Writ of Certiorari was filed from *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 61 (Iowa, 1992). As no Petition for Writ of Certiorari was timely filed following *Federal Land Bank v. Woods*, 480 N.W.2d 61 (Iowa, 1992), this Court lacks jurisdiction to hear the present Petition For Writ of Certiorari. (Supreme Court Rule 13)

The Iowa Supreme Court Ruling in *Federal Land Bank v. Woods*, 480 N.W.2d 61 and its second Ruling in *Federal Land Bank of Omaha v. Woods*, decided July 27, 1994, were both in accord with *Banker's Trust Company v. Woltz*, 326

N.W.2d 274 (Iowa, 1982). The decision of the Eighth Circuit Court of Appeals in *Merrill Lynch v. Knudsen,* 749 F.2d 496 (8th Cir., 1984) regarding an award of attorney fees was decided upon a slip opinion decided August 17, 1983, *Merrill Lynch, Pierce, Fenner and Smith v. Knudsen,* 718 F.2d 1107 Slip Op. at 2 (8th Cir., 1983). The slip opinion was decided prior to the publication of *Woltz,* and Merrill Lynch had not contested the decision regarding attorney fees based on the prior statute. This decision became the law of the case in *Merrill Lynch v. Knudsen.*

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THE WRIT, AND THE CASE DOES NOT PRESENT SIGNIFICANT LEGAL ISSUES OR OTHER SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

Woods claim that Constitutional issues were first raised in their Motion to Adjudicate Law Points is incorrect. Woods' Motion to Adjudicate Law Points makes no allegation of Constitutional issues or raises any Constitutional questions. (App. 44-48) The Trial Court did not follow the Adjudication of Law Points Ruling, but found that since the jury had found there was a partial failure of consideration, it would be impossible for the Court to determine the reasonable amount of attorney fees, and when a person successfully defends himself on a substantial portion of the payees' action on a note, the provisions

for payment of attorney fees in the instrument by the borrower are no longer valid. (App. B-D).

No Constitutional issue had been raised to the Trial Court, and it was clear by the Trial Court's Ruling that it was following Chapter 625.22, as amended in 1980, because had the Trial Court been following Chapter 625.22 as it existed in 1975, the Court would have awarded attorney fees on the percentage basis, approximately $1,400.00, and the Judge would not have had to make a determination as to the "reasonableness" of attorney fees.

FLB appealed the submission of the affirmative defense and also the Trial Court's denial of attorney fees. Woods did not raise a Constitutional issue or Constitutional question in its Brief to the Iowa Supreme Court. (App. 40-43) The Iowa Supreme Court did not consider Constitutional issues, as none had been raised. The Iowa Supreme Court followed its prior Ruling in *Banker's Trust Company v. Woltz*, 326 N.W.2d 274, 278 (Iowa, 1982) wherein the Court, facing the same identical issue held:

> We note that the right to attorney fees and costs are statutory, and depend upon the Statute in force at the termination of the proceedings . . . Since no party is entitled to costs until a judgment is recovered, Iowa Code Section 625.22 (1981), a party has no vested right to costs at the commencement of the action. The right to costs accrue at the termination of the proceedings, and this right exists solely by virtue of the Statute. The extent of the right can be governed only by the Statute in existence at the time the right vests.

The Iowa Supreme Court in *Federal Land Bank v. Woods*, 480 N.W.2d 61, 70 (Iowa, 1992) held that the Woods' contention as to which Statute was applicable was directly contra to the Court's holding in *Woltz*, and reiterated that the Statute in effect when judgment is entered is the controlling Statute. *Id.* The Woods did not file a Petition For Writ of Certiorari from the 1992 *Federal Land Bank v. Woods* Ruling. As such, this Court lacks jurisdiction to grant the Writ of Certiorari. (Supreme Court Rule 13)

The Woods assertion that this case is contrary to the recent decisions of the Eighth Circuit in *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3rd 383 (8th Cir. 1994) and *McDonald Corporation v. Nelson*, 822 F. Supp. 597 (Iowa N.D. 1994) is without merit. Both cases involved the Iowa Legislature passing laws restricting franchise rights. The Courts correctly found that the Law changed the rights which the parties contracted for which they gave consideration for. No consideration was given by the Woods for when they could be sued to collect the note. The note clearly provides for the collection of reasonable attorney fees. (App. A) Both Section 625.22 pre-amendment and post-amendment provide: "When judgment is recovered upon a Written Contract containing an agreement to pay an attorney's fee . . . " As such, Woods knew at the time the Contract was signed that it would not be effective until judgment was recovered. The amendment in the Statute did not require retroactive application to the time the note was executed. Accordingly, the Woods' request for the Court to grant its Writ of Certiorari does not raise a significant legal issue for this Court or for the Federal District Courts, but merely a

decision by the Iowa Supreme Court following two prior decisions.

II.

THE WRIT SHOULD BE DENIED BECAUSE THIS CASE DOES NOT CONFLICT WITH ANY OTHER DECISION OF THE UNITED STATES COURT OF APPEALS.

The decision from which the Woods seek to have this Court grant its Petition For Writ of Certiorari was decided July 27, 1994, *Federal Land Bank v. Woods.* This decision followed two prior Iowa Supreme Court Rulings, *Woltz* and *Federal Land Bank v. Woods,* (1992). On remand from *Federal Land Bank v. Woods,* (1992) the Iowa District Court correctly followed the Iowa Supreme Court's directives regarding assessment of attorney fees, and in response to Woods' claim of a Constitutional defect raised for the first time held: "The Defendants' contention that the Iowa Supreme Court acted unconstitutionally in holding that Plaintiff is entitled to such attorney fees is also without merit. The recovery of such attorney fees and expenses were provided for in the note the Defendant signed. Further, this Court has no jurisdiction to adjudge any part of a decision of the Iowa Supreme Court to be unconstitutional. (App. 33)

In review of Woods' claim on their second appeal to the Iowa Supreme Court wherein they raised Constitutional allegations for the first time, the Iowa Supreme Court in its July 27, 1994 Ruling held: "Our holding at 480 N.W.2d 70, is the law of the case on that issue and may

not be challenged in subsequent proceedings based on a new legal theory." (App. 5).

This Ruling is not at odds with the Eighth Circuit Court of Appeals Ruling in *Merrill Lynch v. Knudsen*, 749 F.2d 496 (8th Cir., 1984). The decision in *Merrill Lynch* was not based on Constitutional issues. The Eighth Circuit in *Merrill Lynch* relied on its previous Ruling in *Merrill Lynch, Pierce, Fenner, and Smith v. Knudsen*, 718 F.2d 1107 Slip Op. at 2 (8th Cir., 1983) as the law of the case. At the time of the Slip Opinion, *Merrill Lynch* was not disputing the claim that attorney fees were based on the pre-existing Statute rather than the amendment.

The timing of the slip opinion is pertinent, as the Iowa Supreme Court decided the same issue in *Woltz* on November 24, 1982, and held:

> We note that the right to attorney fees and costs are statutory, and depends upon the statute in force at the termination of the proceedings . . . Since no party is entitled to costs until a judgment is recovered, Iowa Code Section 625.22 (1981), a party has no vested right to costs at the commencement of the action. The right to costs accrue at the termination of the proceedings, and this right exists solely by virtue of the statute.

This opinion of the Iowa Supreme Court would not have been published at the time the Eighth Circuit heard argument in *Merrill Lynch* and entered its opinion by following the slip opinion, which became law of that case, but only that case.

CONCLUSION

For the reasons set forth above, the Petition For a Writ of Certiorari should be denied.

Dated this 21st day of December, 1994.

Respectfully submitted,

HARRY W. ZANVILLE
Counsel of Record
Attorney at Law
3116 Brockway Road
Waterloo, IA 50701
(319) 232-1404

Counsel for the Respondent,
Federal Land Bank of Omaha

DALE L. PUTNAM
Attorney at Law
518 Montgomery St.
P.O. Box 70
Decorah, IA 52101
(319) 382-2984

Counsel for the Respondent,
Federal Land Bank of Omaha

FORM 269-Accel. Payt. REV.

Loan No. 147 8135699 Donald J. Woods $ 76,500.00
(Name of Member)

Assignment No. MAR 27 1975

VARIABLE INTEREST RATE NOTE

Omaha, Nebraska, February 26, 1975
(Date)

FOR VALUE RECEIVED, I/we, jointly and severally, as principals, promise to pay to

THE FEDERAL LAND BANK OF OMAHA,

a corporation, or order, at its office in the City of Omaha, Nebraska, the principal sum of SEVENTY-SIX THOUSAND FIVE HUNDRED AND NO/100 - - - - - - DOLLARS with interest from the date hereof on the principal sum remaining from time to time unpaid at the rate of nine percent per annum; the principal sum being payable on an amortization plan of five equal annual payments of TWO THOUSAND SEVEN HUNDRED AND NO/100 - - - - - - DOLLARS plus interest, the first payment being due on the first day of March, 1976, and a like payment maturing on the first day of each March thereafter, and of twenty-four equal annual payments of TWO THOUSAND FIVE HUNDRED TWENTY-FIVE AND NO/100 - - - - - - DOLLARS plus interest, commencing on the first day of March, 1981, with a like payment maturing on the first day of each March, thereafter, and a final payment of TWO THOUSAND FOUR HUNDRED AND NO/100 - - - - - - DOLLARS plus interest, payable on the first day of March, 2005, unless this note is matured at an earlier date by additional

payments, which may be made in any amount at any time.

Such additional payments shall be applied to reduce the unmatured principal owing hereon but shall not postpone or defer the payments provided for in this note, the obligation to continuously make such payments shall remain in force until this note is fully paid.

The Bank may, from time to time, establish a higher or lower rate of interest, which shall thereupon apply to the unmatured balance of the debt evidenced hereby and shall remain in effect until a different rate of interest is established. When a different rate of interest is established, the amount of each subsequent payment shall be increased or decreased to reflect the different rate of interest without in any manner changing the due date of such payments.

If any default be made in any payments of either principal or interest, or in case of failure to comply with any of the covenants, conditions or agreements contained in the mortgage(s) given to secure the payment of this note, then, at the election of the holder of this note, without presentment or demand, the principal sum thereof and all accrued interest thereon shall at once become and be due and payable. All defaulted payments shall bear interest at the rate of ten per centum per annum from the date of default until paid. Reasonable attorney's fees may be collected as a part of this indebtedness in any legal proceeding brought to enforce collection (except where prohibited by law).

The signers, endorsers, sureties, and guarantors of this note hereby severally waive presentment, notice or non-payment, protest and notice of protest, diligence in enforcing the payment hereof, and consent that the time of payment may be extended without notice thereof. Each of the persons signing this note hereby binds his or her separate estate, existing at the date of this note or hereafter acquired, for the payment of this note, and agrees that any release of the security, or of any person liable hereon shall not operate as a release of any other signer, endorser, surety, guarantor of this note.

This note is secured by a mortgage on real estate situated in the County or Counties of Clayton, State of Iowa.

_____ /s/ Donald J. Woods

_____ /s/ Lola Jean Woods

IN THE IOWA DISTRICT COURT
FOR FAYETTE COUNTY

THE FEDERAL LAND BANK OF OMAHA, A Corporation, Plaintiff, vs. DONALD J. WOODS and LOLA JEAN WOODS, Defendants.	Case No. 38977 RULING ON POST-JURY TRIAL MOTIONS, DECISION AND JUDGMENT (Filed May 3, 1990)

Plaintiff, The Federal Land Bank of Omaha (the Bank), started this action in July 1982 for payment of the balance allegedly due on a note defendants, Donald J. Woods and Lola Jean Woods (the Woods), gave the bank for a loan to purchase a farm. The action originally asked for the foreclosure of the mortgage on the farm that the Woods gave the Bank as security for the loan. The mortgage was held invalid by the decision of the Iowa Supreme Court in another related action in which the Woods brought an action against other parties.

In their answer, the Woods denied they owed the Bank on the note and affirmatively alleged (inter alia) that the fact that the Bank did not obtain a valid mortgage amounted to a complete failure of the consideration for their signing the note (this was amended to partial failure of consideration a few days before trial). In addition, the Woods' counterclaimed against the Bank for negligence and breach of contract in making the loan without obtaining a valid mortgage.

The trial of this case was delayed for several years pending the outcome of the Woods' action against the other

* * *

The Bank's second ground for Judgment Notwithstanding the Verdict is based on the claim that the affirmative defense of "partial" failure of consideration was not originally pled. In the course of the oral arguments on the post-trial motions, counsel for the Bank conceded that the Woods did file such affirmative defense in an amended Answer filed with leave of the Court several days before trial.

The Bank's last ground for its Motion is based on the argument that as a matter of law the Woods have not suffered any damage by the alleged partial failure of consideration because all of their loss was recovered in their action against Johnson et al in *Moser V.* This point has been extensively discussed earlier and was found to be without merit.

Accordingly, the Bank's Motion for Judgment Notwithstanding the Verdict is *OVERRULED.*

V.

ATTORNEY FEES

Both parties have made claims for attorney fees incurred in this action. The Woods' claim for attorney fees in connection with the counterclaims are no longer viable because the jury rejected all of those claims. The Woods' claim for attorney fees in connection with their successful affirmative defense must also be denied. There

is (with certain exceptions) no statutory provision for the payment of attorney fees unless expressly provided for in a written agreement. There was no provision in the loan agreements for their payment to the Woods. Further, there is no common law right to recover attorney fees as court costs without a specific finding of maliciousness, intentional harassment or injury. *Suss v. Schammel,* 375 N.W.2d 252 (Iowa 1985); *Moser III,* 334 N.W.2d 715 (Iowa 1983). Therefore, the Woods are not entitled to an award of attorney fees resulting from the successful affirmative defense to the suit on the note.

The note on which this action rests does include a provision which states "reasonable attorney fees may be collected as part of this indebtedness in any legal proceeding brought to enforce the collection . . . " Under normal circumstances, an award of attorney fees would be appropriate with respect to the Bank's action to enforce the note. However, in this case the jury found in favor of the affirmative defense raised by the Woods and they were justified in contesting the Bank's action to enforce the note. Under these circumstances, it would be impossible to determine what part, if any, of the Bank's attorney fees were *reasonably* necessary to obtain payment of the note. It is concluded that where, as here, a person successfully defends himself as to a substantial portion of the payee's action on a note, the provisions in the instrument for payment of attorney fees by the borrower are no longer valid. Accordingly, the Bank's claim for attorney fees is denied.

* * *